(3)

No. 84-1062

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NANCY H. GEE,

Petitioner,

v.

COLONEL CLAUDE D. BOYD, III, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER

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EDITOR'S NOTE

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ARGUMENT

1. The Recent ABA Draft Resolution and Report on This Subject Demonstrates the Importance of the Scope-of-Review Questions.

Petitioner's contention that there is a great need for clarification of the

scope and standard of review in NEPA cases involving negative determinations (i.e., decisions not to prepare an EIS) is underscored by the recent release by the Committee on Judicial Review of the American Bar Association's Section of Administrative Law of its preliminary draft of a resolution and report on scope of review standards under 5 U.S.C. §706. Levin, "Federal Scope-of-Review Standards: A Preliminary Restatement," 37 Adm. L. Rev. 95 (1985)(containing the text of the draft resolution and report). This information was not available to the Petitioner at the time the Petition was filed.

The draft report effectively refutes any suggestion that the first question presented in the Petition is merely academic or semantic. See, particularly, id. at 107-09, 120-21. The resolution of

the issue posed will have a considerable practical effect on the way agencies and reviewing courts function in NEPA cases in the future.[1/]

The draft report also recognizes the primary role of the courts in the interpretation of statutes and other provisions of law. Id. at 120. A blanket application of the arbitrary and capricious test to a determination not to prepare an EIS would be inappropriate where, as here, such a determination involves questions of law or a mixed question of law and fact. See Petition

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1/ The general confusion over, and dissatisfaction with, judicial review standards have also prompted recent efforts in Congress to revise federal scope-of-review criteria. See, e.g., Regulatory Procedures Act of 1981: Hearings on H.R. 746 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 97th Cong., 1st Sess. (1981); Senate Report No. 284 on S. 1080, 97th Cong., 1st Sess. (1981).

35-39. At the very least, the reasonableness standard must be applied to the agency's interpretations of law.

Here, the statutory language requiring interpretation included the phrase "significantly affecting the quality of the human environment...." 42 U.S.C. §4332(2)(C). In particular, most of the argument below was devoted to the proper construction of the terms "affecting" and "human environment."

Despite the obvious definitional and statutory construction issues involved in the District Engineer's decision not to prepare an EIS, the Court of Appeals concluded that the only issue is merely "whether the finding of no significant impact is unsupported by the evidence." Petition 9a. That conclusion was plainly wrong. The Petitioner has demonstrated how the outcome would have been different

had the reasonableness standard been applied. Petition 35-39.[2/]

Federal Respondent argues for the first time in its Brief in Opposition (Br. 6-7) that the first issue presented by Petitioner is of no real consequence because the circuits reach the same conclusion in cases involving negative determinations regardless of the standard applied. If that is the situation, the federal courts are wasting considerable time agonizing over, analyzing and describing the differences between the arbitrary and capricious standard and the reasonableness standard in NEPA cases.

2/ Respondent now contends that Petitioner failed to meet the threshold test of materiality applied in NEPA cases. Br. 8. To the contrary, Petitioner and her experts raised several environmental concerns warranting preparation of an EIS which were ignored by the Respondent. See, e.g., C.A. App. 179-91, 202-06.

That alone is reason to grant the Petition.

2. Federal Respondent Raises the Erroneous Notion That Alternatives Need Not Be Considered Once a Decision Not to Prepare an EIS Is Made.

Federal Respondent suggests again for the first time in its Brief in Opposition (Br. 10-11), that the Corps is under no duty to consider alternatives once a finding of no significant impact is made. Such an argument ignores §102(2)(E) of NEPA and the relevant Corps' regulations. 33 CFR §230.5(e) and Part 230, Appendix B, ¶8a. See Petition 54a and Appendix to this Reply Brief.

It is difficult to conceive of a more narrow range of reasonable alternatives than that suggested by Petitioner. The alternative pressed by Petitioner was a smaller marina. The size of the marina

as approved was never justified by any quantitative date regarding demand for slips, but only by conclusory references to "the great need" and a financial analysis showing a breakeven point at 260 slips based on 18% financing. Petitioner demonstrated that a lower rate of 10.1% was the actual rate.3/ Discussion of the number of slips occurred only in the

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3/ Respondent erroneously states that Petitioner failed to offer any evidence bearing on interest rates in the administrative proceedings (Br. 11 n.8). Petitioner's husband submitted comment to the District Engineer demonstrating the actual rate of 10.125%. C.A. App. 202. Petitioner also submitted evidence to the district court showing that the developer considered lower rates prior to the issuance of the permit. C.A. App. 27-40.

Respondent also erroneously suggests (Br. 3-4 n.4) that there is no record support for Petitioner's assertion (Petition 13-14) that 47 property owners submitted petitions to the District Engineer objecting to the permit. This has never been an issue, but support can be found in the Administrative Record (Tab 44) in the form of copies of the actual petitions.

context of the project's financial feasibility, not the need for slips.

4. No Effort Was Made to Verify Any of the Suggested Bases for the Project's Size.

Respondent's erroneous assumption that Petitioner failed to offer evidence bearing on interest rates (Br. 11 n.8) has been noted. See n.2, supra. That error colors his argument. Although Respondent repeatedly argues in his Brief in Opposition that "the great need for slips" was the only factor that led the developer to propose a 298-slip marina (Br. 5, 9, 11), that contention is at odds with the very language of the permit application and the Final EA. See pertinent language quoted at Petition 5-7. The District Engineer clearly relied on economic feasibility and "the great need," but made no effort at all to

verify either basis for issuing a permit for a 298-slip marina. This absence of verification required by both NEPA and applicable regulations is fatal to the action challenged by Petitioner.

CONCLUSION

NEPA cases continue to impose a heavy load on the federal courts, particularly those raising the very questions presented here for review. Resolution of those questions will contribute substantially to judicial economy. As noted in the Petition, the unusual circumstance that these issues are found together here

provides an additional, special and important reason for review.

Respectfully submitted,

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APPENDIX

33 CFR §230.5 Policy.

The U.S. Army Corps of Engineers, under the direction and supervision of the Secretary of the Army, will continue to implement vigorously the National Environmental Policy Act of 1969, applicable environmental quality statutes and the regulations of the Council on Environmental Quality in carrying out its Civil Works mission consistent with statutory responsibilities and other essential considerations of national policy. From the initiation of project planning through design, construction and operation and maintenance, and in developing decisions in the regulation of activities affecting waters of the United States, the goals and policies of NEPA will be considered to insure decisions in the public interest. To this end, the Corps will: . . . (e) Explore, study and analyze all reasonable alternatives, including nonstructural alternatives, with a view to selecting a plan or approving an action that can best satisfy specified needs.